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Kerajaan Malaysia v Tai Choi Yu

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COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO Q-01(IM)-334–07 OF 2012
ABDUL WAHAB PATAIL, MOHTARUDIN BAKI AND MAH WENG KWAI JJCA
14 JANUARY 2015

C

Civil Procedure — Appeal — Appeal against judgment of High Court — Action for recovery of taxes — Application to restore and reinstate civil suit dismissed — Subordinate Courts Rules 1980 O 14 r 21 — Whether suit should be reinstated

D

The appellant appealed against the dismissal by the High Court of the appellant's application to restore and reinstate the appellant's appeal in Appeal 12-18 of 2006 from the decision of the sessions court, where the appellant had commenced action against the respondent to recover the sum of RM161,119.52 being taxed under additional assessments for years of assessment 1979, 1980, 1981, 1982, 1983, 1986, 1989 and 1990. Initially, the sessions court had allowed the respondent's application to strike out under O 14 r 21 of the Subordinate Courts Rules 1980. The appellant's appeal was registered pursuant to an order of the sessions court to allow filing out of time. Being dissatisfied with the sessions court decision to allow filing out of time, the respondent filed an appeal to the High Court, registered as Civil Appeal No 12-17 of 2006 (MR). Civil Appeal No 12-18 of 2006 (MR) was struck off. The appellant obtained leave to appeal to the Court of Appeal. The leave to appeal sought in civil application Q-08-339-2008 was granted. A notice of appeal was filed as Civil Appeal Q-01-130 of 2009 and was allowed with costs. When the appellant's application before the High Court for reinstatement was dismissed with cost, the appellant sought and obtained under s 68(1) of the Courts of Judicature Act 1964 leave to appeal to the Court of Appeal. The instant appeal was the appeal for which that leave was granted and a notice of appeal accordingly filed. The submission for the appellant, briefly, was that the effect of the Court of Appeal allowing Civil Appeal No Q-01-130 of 2009 was that the decision of the High Court in Civil Appeal No 12-17 of 2006 (MR) was overturned, and that Civil Appeal No 12-18 of 2006 (MR), summarily struck off should be reinstated.

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Held, allowing the appeal:

(1) There were two separate appeals from the sessions court ie Appeal No 12-17-2006 and Appeal No 12-18 of 2006. Both appeals were heard

A together. The High Court allowed the respondent's appeal in Appeal No 12-17 of 2006 and struck out the appellant's appeal in Appeal No 12-18 of 2006. The appellant only filed an appeal to the Court of Appeal in Civil Appeal No 01-130 of 2009 in respect of Appeal No 12-17 of 2006 but did not file any appeal to the Court of Appeal in respect of Appeal No B 12-18 of 2006. That would mean the appellant had accepted the decision of the court given in Appeal No 12-18 of 2006 (see para 9(7)).

(2) The Court of Appeal's decision to allow the appeal in respect of Appeal No 12-17 of 2006 did not revive Appeal No 12-18 of 2006 which was a different appeal. There was no appeal in respect of Appeal No 12-18 of C 2006 before the Court of Appeal when it heard Appeal No 12-17 of 2006. There was no evidence to show that the Court of Appeal considered Appeal No 12-18 of 2006 when it heard Appeal No 12-17 of 2006. The draft order of the Court of Appeal exhibited by the appellant in respect of Appeal No 12-17of 2006 merely stated that the appeal was D allowed with costs of RM10,000 (see para 9(8)).

(3) There was nothing in the order to state or provide that Appeal No 12-18 of 2006 was also allowed or was revived or restored, leading the High Court to a decision it could not otherwise have made. The decision in E Civil Appeal No 12-17 of 2006 (MR) that extension of time should not have been granted led directly to the striking out of the appeal in Civil Appeal No 12-18 of 2006 (MR) since without the extension of time granted by the sessions court, Civil Appeal No 12-18 of 2006 (MR) could not be filed. Civil Appeal No 12-18 of 2006 was not heard and F dismissed on its own merits (see para 9(8)(13)).

[Bahasa Malaysia summary

Perayu merayu terhadap penolakan oleh Mahkamah Tinggi permohonan perayu untuk memulihkan dan mengembalikan rayuan perayu dalam Rayuan G 12-8 tahun 2006 daripada keputusan mahkamah sesyen, yang mana perayu telah memulakan tindakan terhadap responden untuk mendapatkan kembali jumlah sebanyak RM161,119.52 yang dikenakan cukai di bawah taksiran tambahan bagi taksiran tahun 1979, 1980, 1980, 1982, 1983, 1986, 1989 dan 1990. Pada awalnya, mahkamah sesyen telah membenarkan permohonan H pemohon untuk membatalkan di bawah A 14 k 21 Kaedah-Kaedah Mahkamah Rendah 1980. Rayuan perayu telah didaftarkan berikutan satu perintah mahkamah sesyen untuk membenarkan pemfailan di luar tempoh waktu. Tidak berpuas hati dengan keputusan mahkamah sesyen untuk membenarkan pemfailan di luar tempoh waktu, responden memfailkan I rayuan di Mahkamah Tinggi, berdaftar sebagai Rayuan Sivil No 12-17 tahun 2006 (MR). Rayuan Sivil No 12-17 tahun 2006 (MR) telah dibatalkan. Perayu memperolehi kebenaran untuk merayu di Mahkamah Rayuan. Kebenaran rayuan yang dipohon dalan Permohonan Sivil Q-08-339 tahun 2008 telah diberikan. Satu notis rayuan difailkan sebagai Rayuan Sivil Q-01-130 tahun

2009 telah dibenarkan dengan kos. Apabila permohonan perayu di Mahkamah Tinggi untuk pengembalian semula ditolak dengan kos, perayu memohon dan memperolehi di bawah s 68(1) Akta Kehakiman 1964 kebenaran untuk merayu ke Mahkamah Rayuan. Rayuan ini adalah rayuan yang mana kebenaran telah diberikan dan notis rayuan telah difailkan sewajarnya. Penghujahan oleh perayu, ringkasnya, adalah bahawa kesan Mahkamah Rayuan membenarkan Rayuan Sivil No Q-01-130 tahun 2009 adalah keputusan Mahkamah Tinggi dalam Rayuan Sivil No 12-17 tahun 2006 (MR) telah diubah, dan bahawa Rayuan Sivil No 12-18 tahun 2008 (MR), yang dibatalkan pada peringkat awal sepatutnya dikembalikan semula.

Diputuskan, membenarkan rayuan:

(1) Terdapat dua rayuan yang berasingan daripada mahkamah sesyen iaitu Rayuan No 12-17 tahun 2006 dan Rayuan No 12-18 tahun 2006. Kedua-dua rayuan didengar bersama. Mahkamah Tinggi membenarkan rayuan responden dalam Rayuan No 12-17 tahun 2006 dan membatalkan rayuan perayu dalam Rayuan No 12-18 tahun 2006. Perayu hanya memfailkan rayuan ke Mahkamah Rayuan untuk Rayuan Sivil No 01-130 tahun 2009 berkaitan dengan Rayuan No 12-17 tahun 2006 tetapi tidak memfailkan apa-apa rayuan ke Mahkamah Tinggi berkaitan Rayuan No 12-18 tahun 2006. Ini bermaksud perayu telah menerima keputusan mahkamah yang diberikan dalam Rayuan No 12-18 tahun 2006 (lihat perenggan).

(2) Keputusan Mahkamah Rayuan untuk membenarkan rayuan berkaitan Rayuan No 12-17 tahun 2006 tidak memulihkan Rayuan No 12-18 tahun 2006 yang merupakan rayuan yang berlainan. Tiada rayuan berkaitan Rayuan No 12-18 tahun 2006 di hadapan Mahkamah Tinggi apabila ia mendengar Rayuan No 12-17 tahun 2006. Tiada keterangan untuk menunjukkan Mahkamah Rayuan mempertimbangkan Rayuan No 12-18 tahun 2006 apabila ia mendengar Rayuan No 12-17 tahun 2006. Draf perintah Mahkamah Rayuan yang diekshibitkan oleh perayu berkaitan Rayuan No 12-17 tahun 2006 hanyalah menyatakan bahawa rayuan telah dibenarkan dengan kos sebanyak RM10,000 (lihat perenggan).

(3) Tiada apa di dalam perintah untuk menyatakan atau memperuntukan bahawa Rayuan No 12-18 tahun 2006 juga dibenarkan atau dipulihkan atau dikembalikan, membawa Mahkamah Tinggi kepada satu keputusan yang tidak boleh sebaliknya dibuat. Keputusan dalam Rayuan Sivil No 12-17 tahun 2006 (MR) bahawa lanjutan masa tidak sepatutnya diberikan membawa terus kepada pembatalan rayuan dalam Rayuan Sivil No 12-18 tahun 2006 (MR) memandangkan tanpa lanjutan masa diberikan oleh mahkamah sesyen, Rayuan Sivil No 12-18 tahun 2006 (MR) tidak boleh difailkan. Rayuan Sivil No 12-18 tahun 2006 tidak

didengar dan ditolak atas meritnya sendiri (lihat perenggan).]

Notes

For cases on appeal against judgment of High Court, see 2(1) *Mallal's Digest* (4th Ed, 2014 Reissue) paras 871–879.

Cases referred to

Hatara (M) Sdn Bhd v Petroliam Nasional Bhd (Petronas) & Anor [2010] 4 MLJ 17; [2010] 3 CLJ 550, CA (refd)

Legislation referred to

Rules of the High Court 1980 O 92 r 4
Subordinate Courts Rules 1980 O 14 r 21

Appeal from: Civil Appeal No 12–18 of 2006 (MR) (High Court, Miri)

Mohd Harris Hanapi (Ridzuan Othman with him) (Lembaga Hasil Dalam Negeri Malaysia, Jabatan Undang-Undang) for the appellant.
Tai Choi Yu (Tai Choi Yu & Co) for the respondent.

Abdul Wahab Patail JCA (delivering judgment of the court):

[1] The plaintiff Kerajaan Malaysia ('the appellant') appealed against the dismissal by the High Court of the appellant's application to restore and reinstate the appellant's appeal in Appeal 12–18 of 2006 from the decision of the sessions court in Summons No 51–7 of 2005 (MR), where the appellant had commenced action against the defendant Tai Choi Yu ('the respondent') to recover the sum of RM161,119.52 being taxes under additional assessments for years of assessment 1979, 1980, 1981, 1982, 1983, 1986, 1989 and 1990.

BACKGROUND

[2] The sessions court had on 5 May 2006 allowed the respondent's application to strike out under O 14 r 21 of the Subordinate Courts Rules 1980 the appellant's above-mentioned summons and statement of claim with costs. The appellant's appeal was registered as Civil Appeal No 12–18 of 2006 (MR) pursuant to an order of the sessions court to allow filing out of time. Being dissatisfied with the sessions court decision to allow filing out of time, the respondent filed an appeal to the High Court, registered as Civil Appeal No 12–17 of 2006 (MR). Both appeals were heard on 29 October 2008, where Civil Appeal No 12–17 of 2006 (MR) was heard first and allowed. Civil Appeal No 12–18 of 2006 (MR) was struck off.

[3] The appellant obtained leave to appeal to the Court of Appeal. The leave to appeal sought in Civil Application Q-08–339 of 2008 was granted on 19 March 2009. A notice of appeal was filed on 6 April 2009 registered as Civil Appeal Q-01–130 of 2009. On 8 February 2011, the appeal was heard and allowed with costs.

[4] When the appellant's application before the High Court for reinstatement was dismissed with cost, the appellant sought and obtained under s 68(1) of the Courts of Judicature Act 1994 leave to appeal to this court. The instant appeal was the appeal for which that leave was granted and a notice of appeal accordingly filed.

THE SUBMISSIONS

[5] The submission for the appellant, briefly, was that the effect of the Court of Appeal allowing Civil Appeal No Q-01–130 of 2009 was that the decision of the High Court in Civil Appeal No 12–17 of 2006 (MR) was overturned, and that Civil Appeal No 12–18 of 2006 (MR), summarily struck off should be reinstated.

[6] The respondent submitted it was not true that Civil Appeal No 12–18 of 2006 (MR) affirmed the dismissal/striking out by the sessions court and it was not true that Civil Appeal No 12–18 of 2006 (MR) was struck off without a hearing on the merits.

[7] It was obvious that although the ruling and the orders in Civil Appeal No 12–17 of 2006 (MR) and Civil Appeal No 12–18 of 2006 (MR) were in the appeal record, determination of the effect of the orders required an appreciation of what was heard before the High Court and if necessary the background in the sessions court. Parties were directed to file additional record of appeal, and that the appeal would be heard afresh on 8 October 2013.

[8] Heard afresh on 8 October 2013, the submissions for the parties remained in substance the same, consistent with the grounds in the memorandum of appeal that the High Court erred:

(a) in dismissing the appellant's application to restore and reinstate the appellant's appeal (Appeal No 12–18 of 2006 MR) on the basis that there was no appeal filed by the appellant in respect of the said appeal to the Court of Appeal. In reliance on that basis, the High Court failed to consider the fact that the appeal was not dismissed;

(b) in failing to consider the fact that the appellant's appeal was struck out. Therefore, the only available avenue for the appellant is to apply for reinstatement, and not to appeal. This is consistent with the principle

laid down by the Court of Appeal in the case of *Hatara (M) Sdn Bhd v Petroliam Nasional Bhd (Petronas) & Anor* [2010] 4 MLJ 17; [2010] 3 CLJ 550; and

(c) in failing to consider and apply O 92 r 4 of the Rules of the High Court 1980 in holding that the High Court has no jurisdiction to restore Appeal No 12–18 of 2006 as prayed by the appellant.

EXAMINATION OF THE RECORD, FINDINGS AND DECISION

[9] We examined the ruling on 12 August 2011 by the High Court. It is as follows:

(1) There are two applications before the court: (1) an application by the Respondent for a review of taxation by the judge under O 59 R 36 RHC (Encl. 46) and (2) an application dated 29.4.2011 (Encl. 47) by the Appellant to restore its appeal in Appeal 12-18-2006 for hearing in this court after its appeal in Appeal 12-17-2006 to the Court of Appeal was allowed.

(2) The facts were as follows. In Sessions Court Summons No. 51-7-2005 (MR), the Appellant claimed against the Respondent for a sum of RM161,119.52 being taxes payable to the Appellant. By a notice of application dated 11.11.2005, the Respondent applied to strike out the summons on the grounds that it disclosed no reasonable cause of action, it was scandalous, frivolous or vexatious and an abuse of the process of the court. On 5.5.2006, the Sessions Court allowed the application and struck out the summons. On an application by the Appellant, the Sessions Court gave leave to the Appellant to appeal to the High Court on 16.11.2006.

(3) The Respondent appealed against the decision of the Sessions Court in granting leave to the Appellant to appeal to the High Court in Appeal No 12-17-2006. The Appellant appealed against the decision of the Sessions Court to strike out its summons No. 51-7-2005 in Appeal 12-18-2006. On 29.10.2008, the High Court allowed the Respondent's appeal with costs in Appeal No. 12-17-2006 and struck out the appeal of the Appellant in Appeal No. 12-18-2006 with costs to be taxed unless agreed.

(4) The Appellant filed a notice of appeal to the Court of Appeal in Civil Appeal No. Q-01-130-2009 against the decision of the High Court given on 29.10.2008 in Appeal No. 12-17-2006 in setting aside the leave granted by the Sessions Court on 16.11.2006. On 8.2.2011, the Court of Appeal allowed the appeal with costs.

(5) Subsequent to the hearing and determination of Civil Appeal No. Q-01-130-2009, the Appellant filed the application in Encl. 47 that its appeal i.e. Appeal No. 12-18-2006 be restored to the list for hearing on the ground that since its appeal to the Court of Appeal against the decision of

the High Court in Appeal No. 12-17-2006 was allowed, Appeal No. 12-18-2006 is consequently still alive and valid and must be restored and reinstated for hearing.

(6) The Respondent opposed this application on the ground that the order of the High Court given on 29.10.2008 to strike out the appeal had been perfected and the court was functus officio. Further, there was no appeal against the decision of the court in Appeal No. 12-18-2006.

(7) I agree. It must be noted that there were two separate appeals from the Sessions Court i.e. Appeal No. 12-17-2006 and Appeal No. 12-18-2006. Both appeals were heard together. On 29.10.2008, the High Court allowed the Respondent's appeal in Appeal No. 12-17-2006 and struck out the Appellant's Appeal No. 12-18-2006. The Appellant only filed an appeal to the Court of Appeal in Civil Appeal No. 01-130-2009 in respect of Appeal No. 12-17-2006 but did not file any appeal to the Court of Appeal in respect of Appeal No. 12-18-2006. That would mean the Appellant had accepted the decision of the court given in Appeal no. 12-18-2006.

(8) The Court of Appeal's decision to allow the appeal in respect of Appeal No. 12-17-2006 did not revive Appeal No. 12-18-2006 which was a different appeal. There was no appeal in respect of Appeal No. 12-18-2006 before the Court of Appeal when it heard Appeal No. 12-17-2006 on 8.2.2011. There was no evidence to show that the Court of Appeal considered Appeal No. 12-18-2006 when it heard Appeal No. 12-17-2006. The draft order of the Court of Appeal (NMR-9) exhibited by the Appellant in respect of Appeal No. 12-17-2006 merely stated that the appeal was allowed with costs of RM 10,000.00. There was nothing in the order to state or provide that Appeal No. 12-18-2006 was also allowed or was revived or restored.

(9) The court order given on 29.10.2008 in Civil Appeal No. 12-18-2006 has not been set aside and up to this date there is no application by the Appellant to set it aside and there is also no appeal against that order. Accordingly, this court has no jurisdiction to set aside that court order given on 29.10.2008 and to restore Appeal No. 12-18-2006 as requested by the Appellant. There is no merit in the Appellant's application in Encl. 47 and the same is dismissed with costs of RM300.00.

[10] We then examined the supplementary record of appeal filed. It showed, inter alia, the notes of proceedings of the High Court in Civil Appeal No 12–18 of 2006 (MR). It is clear from the notes of proceedings, a contemporaneous record of the decision, that Civil Appeal No 12–18 of 2006 (MR) was struck out for the reason that Civil Appeal No 12–17 of 2006 (MR) was allowed, and not dismissed on its own merits:

24th September, 2008.

For Appellant: Mr. Norhisham

For Respondent: Mr. Norhisham s/i for Mr. Tai Choi Yu.

Court: To 29.10.2008 at 2.30 p.m. for CRD,

Sgd:

(Musyiri B. Peet)

Deputy Registrar

Wednesday: 29th October, 2008 at 2.30 p.m.

For Appellant: Puan Normareza

For Respondent: Mr. Tai Choi Yu.

Court:

Since the appeal is allowed in 12-17-2008(MR), this appeal is academic and therefore be struck out with costs to be taxed, unless agreed.

[11] The above settles the question as to what was decided on 29 October 2008.

[12] We reproduce again paras 3 and 4 of the ruling:

> (3) The Respondent appealed against the decision of the Sessions Court in granting leave to the Appellant to appeal to the High Court in Appeal No 12-17-2006. The Appellant appealed against the decision of the Sessions Court to strike out its summons No. 51-7-2005 in Appeal 12-18-2006. On 29.10.2008, the High Court allowed the Respondent's appeal with costs in Appeal No. 12-17-2006 and struck out the appeal of the Appellant in Appeal No. 12-18-2006 with costs to be taxed unless agreed.
>
> (4) The Appellant filed a notice of appeal to the Court of Appeal in Civil Appeal No. Q-01-130-2009 against the decision of the High Court given on 29.10.2008 in Appeal No. 12-17-2006 in setting aside the leave granted by the Sessions Court on 16.11.2006. On 8.2.2011, the Court of Appeal allowed the appeal with costs.

[13] The inaccuracy in para 3 of the ruling as to Civil Appeal No 12–17 of 2006 (MR) is minor and does not affect the fact that the High Court on 29 October 2008 did decide:

(a) to strike out the appellant's appeal in Civil Appeal No 12–18 of 2006 (MR); and

(b) on the grounds the respondent's Civil Appeal No 12–17 of 2006 (MR) was allowed, thereby setting aside the leave granted to the appellant by the sessions court on 16 November 2006 for extension of time to file and serve a notice of appeal against the judgment given by the sessions court on the 5 May 2006.

[14] It is that appeal against the setting aside by the High Court of the order of the sessions court made on 16 November 2006 that was allowed by the Court of Appeal on 8 February 2011:

(a) subsequent to which a summons in chambers under O 92 r 4 of the Rules of the High Court 1980 was filed on 29 April 2011 to restore Civil Appeal No 12–18 of 2006 (MR) to be heard; and

(b) which was dismissed by the High Court on 12 August 2011.

[15] The High Court, however, overlooked the notes of proceedings of the High Court as reproduced at para 10 above, leading the High Court to a decision it could not otherwise have made. The decision in Civil Appeal No 12–17 of 2006 (MR) that extension of time should not have been granted led directly to the striking out of the appeal in Civil Appeal No 12–18 of 2006 (MR) since without the extension of time granted by the sessions court, Civil Appeal No 12–18 of 2006 (MR) could not be filed. Civil Appeal No 12–18 of 2006 was not heard and dismissed on its own merits.

[16] We, therefore, allowed the appeal with costs in the sum of RM10,000, set aside the order of the High Court, and entered an order that Civil Appeal No 12–18 of 2006 (MR) before the High Court be reinstated.

Appeal allowed.

Reported by Afiq Mohamad Noor